

21 January 2013

The Fences Act Review
C/- Department of Justice
Level 24, 121 Exhibition Street
MELBOURNE VIC 3000

DIVIDING FENCES REVIEW – PROPOSALS TO REFORM THE FENCES ACT 1968

The Victorian Farmers Federation (VFF), Australia's largest state farmer organisation and only recognised consistent voice on issues affecting rural Victoria, welcomes the opportunity to submit on the *Dividing fences review – Proposals to reform the Fences Act 1968*.

The VFF receives frequent queries from farmers about fencing law, including queries regarding:

- disputes about what type of fence is appropriate
- how the costs of fencing should be apportioned
- what constitutes an adequate fence, and how this applies when farm land neighbours a residential property.

The Fences Act 1968 is sometimes useful, particularly for questions about farm land that neighbours a residential property. However, in many cases there is a lack of guidance provided regarding the apportionment of cost, and what constitutes an adequate fence in a purely agricultural setting. In cases where there is no guidance, or unclear guidance, we are forced to merely provide common-sense advice, rather than giving guidance backed by legislative provisions.

This lack of guidance and clarity was identified as a key motivator for the reform of the Fences Act 1968. It is therefore essential the reforms to the Fences Act provide improved guidance to neighbouring landholders about their rights and responsibilities when it comes to locating, constructing, and maintaining dividing fences.

The VFF is broadly supportive of the proposals contained in the Department of Justice discussion paper. The proposals will help address a number of common questions and disputes between adjoining landholders. The VFF will now take the opportunity to respond to the relevant proposals set out in the Department of Justice discussion paper.

Shifting liability from occupiers to owners

While this change is more theoretical than practical, the VFF believes the principle should be applied to public land that is unencumbered by a lease or license. That is, public landholders should have equal fencing responsibilities to private landholders. Since farmers have a duty to house stock within their properties, public land managers should equally have a responsibility to keep wildlife within public parks. The costs of repairing fences following damage by wildlife is currently fully met by private landholders.

Recommendation 1: Make public landholders equally liable with private landholders for the construction and maintenance of boundary fences between public and private land.

Entitlement to require a 'sufficient fence'

The VFF agrees the principle that dividing fencing must be 'sufficient for the purposes of both occupiers' is sometimes unhelpful. There are clearly cases where the requirements of adjoining neighbours are very different. This is particularly true in the agricultural context where fencing requirements and preferences can differ substantially between farmers and farm types.

In an agricultural context the key factors to determine a 'sufficient fence' would be:

- the existing dividing fence
- the uses of the adjoining land
- any existing agreements.

In the agricultural context, where both neighbours are farmers, the determination of a sufficient fence can be complicated by changing land uses. However, in the absence of existing agreements the VFF considers two principles could be used to address this, which set the baseline for a 'sufficient fence' at the existing fence (if one exists):

- Where an existing fence is sufficient for the purposes of one neighbour, but not for the other, the neighbour with the greater fencing requirement be required to pay the cost of upgrading the fence (this is consistent with the second bullet point in paragraph 21 on page 5 of the discussion paper).
- Where a neighbour has a lesser fence requirements compared to the existing fence, while the other requires the existing fence, the 'sufficient fence' would stay at the baseline of the existing fence and both farmers would contribute in equal proportions to replacing, maintaining, and repairing the fence.

The second point is not adequately covered in the discussion paper.

In cases where farm land borders residential land, only the first principle should apply. The fence required by the farmer (e.g. a stock proof fence) would be the 'sufficient fence' regardless of what the existing fence is (this is consistent with the current provisions in the Fences Act).

Fairer rules for apportioning contribution

The VFF supports the express provision that adjoining owners are liable in equal proportions to the cost of constructing, maintaining, or repairing a dividing fence of a standard not greater than a sufficient fence.

The VFF also supports the proposed inclusion of common sense scenarios that permit or justify the departure from the primary principle of equal contribution. These scenarios are common and presumably result or are at issue in a significant proportion of boundary fencing disputes. The VFF is particularly supportive of the fourth bullet point:

"where negligent and/or deliberate acts destroy or damage a dividing fence or contribute to shortening the reasonable life span of a dividing fence, the owner or occupier responsible for

the negligent or deliberate acts that damage or destroy a fence will be liable for the whole costs of any fencing works to repair or replace the dividing fence (proportionate to the damage caused)”

Farmers are regularly the victims of poor land management on public land, and are subject to permitting requirements to undertake works on public land (such as roadsides). However, without active management, trees bordering fences can cause major damage to fences in the event of fallen limbs or a tree fall. This clause regarding liability for damage to fences through negligence should apply to all land managers.

Recommendation 2: The proposed clause that creates a liability for negligent and/or deliberate acts that destroy or damage a dividing fence should apply to all landholders.

Providing guidance on the location of a diving fence

The VFF supports the proposed guidance on the location of dividing fences, and is particularly supportive of provisions that prevent adverse possession claims.

Notification requirements – Single procedure for ‘fencing works’

The VFF supports the establishment of simplified notification requirements for fencing works. It is notable that most rural fencing would likely be undertaken by mutual agreement between neighbours without undertaking the formal notification procedures outlined in the Fences Act. However, simplified formal notification processes may provide a useful back-up for cases where neighbours have a less amicable relationship, or where one neighbour is an absentee.

Fencing where the neighbouring owner is absent

The VFF supports provisions that enable the disclosure of addresses by Council’s for the purposes of serving fencing works notices. Absentee landowners are becoming more common with lifestyle and hobby farming (where the landowners do not regularly reside at the property) and in areas where commercial agriculture is becoming cost prohibitive because of land values. It is important adjoining landholders have an efficient mechanism to locate these landholders for the purposes of providing a notice of works and/or to seek contribution for these works.

Urgent works

The VFF supports the proposals to improve the emergency fencing works provision.

If you wish to discuss any issues raised in this submission further, please contact the VFF’s Land Management Policy Adviser, Jacob McElwee on 1300 882 833.

Yours Sincerely



Gerald Leach
Land Management Committee Chair